SUPREME COURT, U. S.
Supreme Court, U. S.
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DEC 2 1974
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-531

THOMAS F. PATTON and RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR, *Petitioners,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and CONGRESS OF RAILWAY UNIONS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 500 F.2d 34 (6th Cir., 1974) and is set forth beginning at page A1 of the Appendix to the Petition. Ex Parte Order No. 71 of the District Court is not yet reported but appears on pages A8 and A9 of the Appendix to the Petition. Order No. 101 of the District Court together with Memorandum Opinion, also not reported, is set forth beginning at page A10 of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

This Court is asked to determine whether the Court of Appeals erred in reversing and vacating orders of a District Court entered without the receipt of evidence as to their effect upon the employees involved and which summarily changed the wages and working conditions of railroad employees.

Specifically, the questions presented are:

1. Whether Section 77(n) of the Bankruptcy Act, 11 U.S.C. Sec. 205(n), contains an express limitation upon a reorganization court's equitable powers which prohibited the District Court from summarily changing the wages and working conditions of employees of the Debtor railroad without compliance with the provisions of the Railway Labor Act, 45 U.S.C. §§ 151 et seq?

2. Did the District Court err in refusing to receive testimony from the railroad employees on the question of irreparable harm to them as a result of the issuance of the Court's orders?

3. Do the *Nemitz* and *Pitney* decisions of this Court effectively repeal Section 77(n) of the Bankruptcy Act and Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. Sec. 5(2)(f)?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the Petition, there is involved herein Section 2 Seventh of the Railway Labor Act, 45 U.S.C. Sec. 152 Seventh, which is set forth in Appendix A hereto.

COUNTERSTATEMENT OF THE CASE

The Petitioners' Statement of the Case while basically accurate, is not complete and in one respect, at least, incorrectly states the effect of the agreement affected by the orders of the District Court.

The Erie-Lackawanna Railroad Company sought merger into the Erie Lackawanna Railway Company, a subsidiary of the Norfolk and Western Railway Company (N&W), pursuant to the provisions of Section 5(2) of the Interstate Commerce Act. The merger was approved by the Interstate Commerce Commission (I.C.C.) on June 9, 1967, subject to the execution of an agreement protecting the interests of the employees of the Erie-Lackawanna Railroad Company who became employees of the Erie Lackawanna Railway Company. The agreement provided that effective on the consummation date of the merger of the Railroad Company into the Railway Company "no employee would be placed in any worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during their employment after inclusion." (App. A19.)[1] Each employee's compensation was guaranteed to continue at a level equal to the employee's average monthly wage for the preceding 12 months. The employees of Erie Lackawanna Railway Company received the benefits of the agreement from April 1, 1968, until March 1, 1973.

On March 20, 1973, the Petitioners *ex parte* requested the Reorganization Court to suspend payments under the agreement as of March 1, 1973, until the I.C.C. could act on the petition filed with that agency on the

[1] "App." references are to the Appendix to the Petition.

same day to suspend the operation of all provisions of the protective agreement during pendency of the reorganization proceedings. A copy of the Petition filed with the Reorganization Court is attached hereto as Appendix B. The Reorganization Court, on March 21, 1973, issued Order No. 71, without hearing or notice to the Respondents (contrary to established Reorganization Court procedure), granting the Petitioners' request based upon a finding of irreparable injury to the estate of the Debtor.[2]

Respondents filed a motion to vacate Order No. 71 and requested a hearing. As noted by the Court of Appeals, which had before it the entire transcript of the hearing on the motion to vacate, the Respondents proffered testimony on the question of irreparable injury but the Petitioners did not. (App. A3.)[3] The Respondents proffered *inter alia* the testimony of "witnesses who will testify that many employees affected by this [order] would have their wages just

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[2] In their petition to the Reorganization Court—which was not served upon the employees' representatives until after it had been approved—the Petitioners did not allege irreparable injury. Indeed, no such allegation was made by Petitioners prior to the filing of their brief with the Sixth Circuit.

[3] Petitioners' footnote attempt to indicate to this Court that Petitioners offered to present testimony on irreparable harm is inadequate. As a reading of the entire transcript of the hearing before the Reorganization Court demonstrates, the Petitioners never claimed that payments to the employees under the protective agreement constituted irreparable injury to the estate of the debtor railroad. To the contrary, counsel for the Trustees "recognized" that on the issue of "irreparable harm", when one is dealing with a body of people . . . [which] very apparently includes many who are of slim financial means [there are] those who might be hardship cases". The entire quotation from the argument of Petitioners' counsel to the Reorganization Court from which these excerpts are taken, is attached to this brief as Appendix C.

about cut in half by the suspension of these payments".[4]

On May 7, 1973, the Reorganization Court denied the motion to vacate and reaffirmed its Order No 71 by the entry of its Memorandum, Opinion and Order No. 101. (App. A10-A17.)

Respondents appealed the orders of the Reorganization Court to the United States Court of Appeals for the Sixth Circuit which reversed the Reorganization Court and vacated Orders Nos. 71 and 101.

Shortly before the Court of Appeals issued its decision, the I.C.C. denied Petitioners' request to suspend operation of the provisions of the protection agreement during the pendency of the reorganization proceeding. (App. A3.) The Petitioners have appealed the adverse I.C.C. decision to a statutory three-judge District Court in the Northern District of Ohio.

The Sixth Circuit Court of Appeals held, first, that I.C.C. denial of Petitioners' request "undercuts the basis upon which the District Court order was entered." (App. A2.)

Secondly, the Court held that the Reorganization Court had violated the following prohibitions of Section 77(n) of the Bankruptcy Act, 11 U.S.C. Sec. 205(n):

> "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees *except in the manner prescribed in sections 151 to 163 of Title 45, as amended June 21, 1934* [*Railway Labor Act*], or as they may be hereafter amended." (Emphasis added.)

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[4] The proffer of testimony by Respondents is set forth in Appendix D hereto.

Finally, the Court of Appeals held that even if Section 77(n) was not applicable, the Reorganization Court improperly wielded its equity powers by refusing to hear testimony on what represented the status quo and what, in terms of irreparable injury, would be the effect of suspension.

Since March 1, 1973, a period of over twenty-one months as of the date of the filing of this brief, many employees have been deprived of a substantial portion of their monthly income despite consistent rulings adverse to Petitioners. According to the petition at page 6 thereof, the employees had been deprived of monthly income totaling $1,157,593 as of August 1, 1974.

While the petition states that "in no case have the impounded payments to a given employee constituted all the payments due him or her for a given month" (Petition, p. 6), the Respondents proffered testimony to demonstrate that "many employees affected . . . would have their wages just about cut in half by the suspension of these payments".

ARGUMENT

The Petition makes no claim that it presents important questions of federal law or that the decision below conflicts with decisions of other Courts of Appeal or was decided erroneously upon the facts before it. Petitioners do not even claim a direct conflict between the decision of the Court of Appeals and a decision or decisions of this Court.

Petitioners attempt to justify the issuance of a writ of certiorari to the Sixth Circuit Court of Appeals upon a claimed conflict between the Sixth Circuit's

decision and certain principles enunciated by this Court in *Order of Railway Conductors, et al.* v. *Pitney, et al.*, 326 U.S. 561 (1946); *Thompson, Trustee, etc., et al.* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940); and, *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971).[5]

The Petition closes by calling upon this Court to exercise its powers of supervision over the Sixth Circuit because "vacation of Orders Nos. 71 and 101 of the Reorganization Court *cut off* any evidentiary hearing on the major issue of irreparable harm". (Emphasis supplied.) (Petition, p. 14.) As noted above at page 4, the Petitioners never proffered evidence of irreparable harm. They are now estopped from claiming they were not permitted to introduce evidence on that issue. In any event, it is obvious that the Sixth Circuit could not remand a case for the receipt of evidence on an issue upon which it had found the lower court had no authority to act under Section 77(n) of the Bankruptcy Act, 11 U.S.C. Sec. 205(n).

On the other hand, had the Sixth Circuit held Section 77(n) to be inapplicable to the situation before it, Petitioners' claim of deprivation of due process would be equally specious: Upon vacation of the order of the Reorganization Court, the Petitioners merely would have had to renew before the Reorganization Court their motion to suspend payments; offer their evidence; and, receive their order.

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[5] As will be shown below, the decision of the Sixth Circuit is not in conflict with the principles contained in the *Pitney*, *Thompson* and *Nemitz* decisions. The holdings of those cases are not even applicable to the instant situation.

I.

THERE IS NO CONFLICT OF DECISION

Petitioners are unable to cite any applicable decision of this Court or Courts of Appeals which are in direct conflict with the decision of the Sixth Circuit. The strongest accusation Petitioners are able to level at the Sixth Circuit's reversal and vacation of the orders of the Reorganization Court is that it acted "in conflict with the principles enunciated in *Pitney* and *Thompson*" (Petition, p. 10) and is "contrary to the principle of this Court's *Nemitz* decision." (Petition, p. 11.)

In Petitioners' view, *Pitney* and *Thompson* establish the principle that the proper exercise of the equitable and supervisory powers of a Reorganization Court includes its temporary or interim change of wages and working conditions pending the outcome of related litigation, regardless of the prohibitions of Section 77(n) of the Bankruptcy Act.

Neither of the decisions cited even remotely stands for such a proposition. This Court's decision in *Thompson, Trustee* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940), is inapplicable. It did not involve Section 77(n) of the Bankruptcy Act, nor did it involve wages or working conditions of employees. Furthermore, unlike the actions of the Reorganization Court in the instant case, the action of the *Thompson* court in authorizing the extraction of oil and impoundment of proceeds from the sale thereof, hurt neither party but benefited both.

Order of Railway Conductors, et al. v. *Pitney, et al.*, 326 U.S. 561 (1946), does not override the prohibitions of Section 77(n) in the name of preserving the

Debtor's estate. In the *Pitney* case the prohibitions of Section 77(n) did not apply. There, two unions each claimed that its contract "embodied" the working conditions involved. In order to operate his railroad the Trustee had to choose between them. As a matter of law, therefore, the particular working condition involved could not be held to be "embodied" in either agreement for purposes of Section 77(n) prohibitions until the National Railroad Adjustment Board had resolved the matter by finally interpreting the contracts.

Here, unlike the situation in *Pitney,* the suspended payments *were* "embodied" in the agreements and, therefore, the Section 77(n) prohibitions did apply.[6]

The Petitioners also claim that in *Norfolk & Western R. Co.* v. *Nemitz,* 404 U.S. 37 (1971), "this Court affirmed the Sixth Circuit's determination that Section 77(n) can have no application to protection agreements approved by the I.C.C. . . ." (Petition, p. 11). The Sixth Circuit made no such determination in *Nemitz* and this Court, of course, affirmed no such determination. In fact, Section 77(n) of the Bankruptcy Act was not involved in the *Nemitz* case.

This Court did not set aside the requirements of the Bankruptcy Act, the Railway Labor Act or any other statutory provision by its decision in *Nemitz.* That decision merely prohibited a railroad and the representatives of its employees from substantially abrogating protections provided employees by the I.C.C. in approving a transaction pursuant to Section 5(2) of the Interstate Commerce Act, 49 U.S.C. Sec. 5(2). Certainly, that decision does not, specifically or by implication, authorize a Reorganization Court, temporarily or permanently, to "substantially abrogate" such protection as the Reorganization Court did in this case.

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[6] Petitioners do not challenge the fact that the suspended payments are "wages" within the meaning of Section 77(n).

The *Nemitz* decision did not affect the applicability of Section 77(n). Its only effect upon the Railway Labor Act was to place an additional requirement upon management and labor where they contemplate changes in a bargaining agreement which has been imposed by the Commission for the protection of employees in a Section 5(2) transaction. In such event, following compliance with the provisions of the Railway Labor Act, the parties would have to secure the approbation of the I.C.C. that the changes were fair and equitable and did not "substantially abrogate" rights guaranteed by the agreement provisions imposed by the Commission.

At most, therefore, *Nemitz* would merely add I.C.C. sanction to existing Railway Labor Act requirements in situations involving wage and working conditions changes subject to the prohibitions of Section 77(n).[7]

II.

THE DECISION BELOW IS CLEARLY CORRECT

For well over thirty years the law has been settled that a receiver or trustee in bankruptcy may not change the wages or working conditions of employees of railroads in reorganization or receivership except in accordance with the provisions of the Railway Labor Act, as amended, 45 U.S.C. §§ 151 et seq. *Burke* v. *Morphy, et al.* (2nd Cir. 1940), 109 F.2d 572, *cert. den.* 310 U.S. 635 (1940); *Grand International Brotherhood of Locomotive Engineers, et al.* v. *Morphy et al.*, 109

[7] Petitioners' attempt, at page 12, footnote 6 of their Petition, to "explain" the Sixth Circuit's "changed position" regarding the effect of its *Nemitz* decision is an exercise in semantics. As noted herein, *Nemitz* is not applicable in the instant situation. In any event, the Reorganization Court did "substantially abrogate" the protections imposed by the I.C.C. for the benefit of the employees by suspending those provisions of the agreement requiring payment of monthly wage guarantees to employees.

F.2d 578 (2nd Cir. 1940), cert. den. 310 U.S. 635 (1940).

Petitioners concede that as of August 1, 1974, the employees of the Erie Lackawanna who are embraced within the coverage of the protective agreements had been deprived of at least $1,157,593 in monthly income with which to support their families. (Petition, p. 6.) As indicated in the Respondents' proffer of testimony to the Reorganization Court, those employees have had their monthly wages cut by amounts ranging to 50%. (Appendix C.) No attempt was made by the Petitioners to reduce those wages pursuant to the procedures of the Railway Labor Act, 45 U.S.C. §§ 151 et seq., as required by Section 77(n) of the Bankruptcy Act, 11 U.S.C. Sec. 205(n). The Reorganization Court, at the request of the Petitioners, authorized and directed the Petitioners to suspend the payment of monthly wage guarantees as required by collective bargaining agreements to which the Debtor railroad and the representatives of its employees were parties. The Sixth Circuit correctly concluded that such action was prohibited by Section 77(n).

The Sixth Circuit also concluded correctly that the refusal of the Reorganization Court to receive evidence on the irreparably harmful effects of the issuance or non-issuance of an order of suspension was fatal error. *The Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 254 (1970); *Detroit Newspaper Publishers Ass'n.* v. *Detroit Typographical Union*, 471 F.2d 872, 875 (6th Cir. 1972), *cert. den.*, 411 U.S. 967 (1973). Indeed, on the face of it, orders which rely for their validity upon factual findings regarding the "balancing of equities" and the existence of "irreparable harm", must be based upon a

factual record supporting such findings. The record in this case contains only Respondents' proffer of evidence of irreparable harm to employees and the Petitioners' deposit in an escrow account of over $1,000,000 withheld from the monthly wages of employees.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Section 2 Seventh, Railway Labor Act, 45 U.S.C. § 152 Seventh

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

APPENDIX B

Petition to Reorganization Court for Suspension of Monetary Wage Guarantee Payments to Employees

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings for the Reorganization of a Railroad

No. B72-2838

In the Matter of

ERIE LACKAWANNA RAILWAY COMPANY, Debtor.

PETITION OF TRUSTEES CONCERNING SUSPENSION OF EMPLOYEE PROTECTION AGREEMENT

THE PETITION of Thomas F. Patton and Ralph S. Tyler, Jr., Trustees of the Debtor's property in the above matter, respectfully represents that:

1) By petition dated September 28, 1965, the Debtor's predecessor, Erie-Lackawanna Railroad Company, petitioned the Interstate Commerce Commission (Commission) to reopen the proceedings in Finance Docket Nos. 21510-21514 and 21567 for further hearings and consideration for the purpose of finding and determining equitable terms for, and ordering the inclusion of, Erie-Lackawanna Railroad Company in the Norfolk and Western Railway Company System.

(2) After extensive proceedings, the Commission entered an order dated June 9, 1967 approving inclusion of the Erie-Lackawanna Railroad Company in the Norfolk and Western Railway Company System. Such order further provided that the inclusion be accomplished by a merger of the Erie-Lackawanna Railroad Company into the Erie Lackawanna Railway Company (Debtor), a newly organized corporation, which was then and at all times

thereafter has been a wholly owned subsidiary of Norfolk Western Railway Company. Pursuant to such order, the Erie-Lackawanna Railroad Company was merged into the Erie Lackawanna Railway Company (Debtor) on April 1, 1968.

(3) In view of the contemplated change of ownership and control of of the Debtor's system pursuant to the inclusion order, the Commission provided in its order that certain "protection" be afforded the Debtor's employees. More specifically it was provided that the Debtor's employees should be protected in the same manner as counterpart employees of carriers previously included in the Norfolk and Western System pursuant to a prior Commission order entered in 1964 in the Norfolk and Western-Nickel Plate-Wabash unification proceedings. Hence, the Commission ordered the parties to submit evidence to it of agreement with respect to such protection within sixty days from the effective date of the inclusion order, and failing evidence of such agreement within that period, the Commission would prescribe appropriate conditions.

(4) In accordance with the Commission's directions concerning employee protection, the Debtor and the Railway Labor Executives' Association, representing the affected labor unions in the Debtor's system, entered into an agreement dated August 19, 1968 entitled "Agreement for Protection of Employees of Erie-Lackawanna Railroad Company Following Merger of Said Company Into Erie Lackawanna Railway Company" (Protection Agreement). The effective date of the Protection Agreement is April 1, 1968, and its essential terms require that the Debtor guarantee that none of its employees shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto, at any time during their employment. Certain related agreements, including implementing agreements, were entered into pursuant to the Protection Agreement.

(5) The Trustees believe and, therefore, allege that the Protection Agreement entered into pursuant to the Commission's inclusion order was founded upon the premise that the Debtor's employees would be adversely affected as a result of the vesting of ownership and control of the Debtor's system pursuant to the inclusion order in Norfolk and Western Railway Company; that the payments provided for in the Protection Agreement and related agreements are based upon the implied condition of the establishment and continuation of such control and ownership; that upon the appointment and qualification of the Trustees in the reorganization proceedings herein, they became seized of the ownership and control of the Debtor's property, thereby terminating the ownership and control of Norfolk and Western Railway Company; and that accordingly since the underlying conditions of control and ownership by Norfolk and Western Railway Company have ceased to exist and will continue to be non-existent during the course of these proceedings, there is correspondingly no basis upon which to continue the operation of the Protection Agreement and related agreements during these proceedings.

(6) The payments provided by the Protection Agreement and related agreements, which are accruing at the current rate of approximately $115,000 per month, or about $1.4 million per year, and will continue indefinitely, should be suspended during the course of these proceedings. A determination to that effect is being sought by the Trustees in proceedings recently commenced before the Commission.

(7) The Trustees believe and, therefore, allege that pending a determination of such matter before the Commission, or before any other body or tribunal in proceedings related thereto, the payments otherwise provided to be made pursuant to the Protection Agreement and related agreements should be suspended and deposited in a special account drawing intrest at the maximum available rate at

Society National Bank, Cleveland, Ohio, subject to the orders of this Court.

(8) The Trustees believe and, therefore, allege that the matters for which authority is requested by this petition will be in the interest of the Debtor's estate and of ultimate reorganization; and that the same will not unduly or adversely affect the public interest.

WHEREFORE, the Trustees pray that an order be entered herein:

(1) Authorizing the Trustees to suspend the payments provided by the Protection Agreement and related agreements until further order of this Court;

(2) Directing that the payments provided for by the Protection Agreement and any related agreements be deposited in a special account drawing interest at the maximum available rate at Society National Bank, Cleveland, Ohio, subject to the orders of this Court.

(3) Granting such other and further relief as this Court deems appropriate.

THOMAS F. PATTON and
RALPH S. TYLER, JR.
Trustees of the Property of
the Debtor

/s/ By RALPH S. TYLER, JR.
Ralph S. Tyler, Jr.
One of the Trustees

March 20, 1973

GARY L. BRYENTON
Counsel for Trustees

APPENDIX C

Petitioners' Argument to Reorganization Court on Irreparable Harm

(Transcript of Hearing on Motion to Vacate Order No. 71 at pages 55 and 56)

Now, when we speak of irreparable harm, we, on behalf of the trustees, recognize of course that when one is dealing with a body of people, people as large as two thousand, I think, approximately, that number, plus, received payments in the calendar year which would have closed February 28, under the agreements, there will be individual hardships. That, just as a matter of percentages, would inevitably be true, I suppose; but what we are concerned with in these proceedings, viewing the reorganization overall, is the preservation of the Erie-Lackawanna Railway as a going concern, one which will be able to furnish employment, indeed to the very men involved, as those who might be hardship cases; and we have to consider whether or not it isn't reasonable to impound for what we hope will be a relatively short time, the payments under those agreements until it is determined whether or not the agreements themselves can be suspended, because by the very arguments which the opposition has adduced, it is proof certain that the trustees could never recoup payments aggregating a million three hundred thousand dollars a year from this body of men which, without any suggestion of criticism, very apparently includes many who are of rather slim financial means, so that to say that this railway which is in the process of reorganization, which we all hope will emerge as a thriving, growing concern, should pay out a million three hundred thousand dollars a year with, I would say, no practical hope of recouping it, must weigh very strongly against individual cases of personal hardship.

APPENDIX D

Respondents' Proffer of Testimony to Establish Irreparable Injury

(Transcript of Hearing on Motion to Vacate Order No. 71, at pages 40-41)

Now, insofar as irreparable injury is concerned, we have witnesses who will testify that many employees affected by this would have their wages just about cut in half by the suspension of these payments. Some of these employees would be reaching retirement age, and upon retirement, they would be gauged in terms of their benefits by the monies that they were receiving at the time of the retirement; so that this would forever affect the annuity they would receive from the railroad retirement board.

Many of the employees have made commitments with regard to the purchase of homes and automobiles and appliances and that sort of thing, based upon the fact that they had this minimum wage guarantee; and as a result of something the railroad wanted and not them.

The elimination of these payments will permit the carrier, for example, to force employees to assign jobs at lower pay. They won't do it now. They don't do it now, because the man has a minimum wage guarantee that they have to pay anyway, but without that wage payment, they would force them into these lower paying jobs, and any grievance the man might have with regard to violation of regular rules agreement would probably take three years to have worked through arbitration.

Now, all of these things will happen, and the evil which we see in the suspension of these payments, pending the Commission acting on the suspension of these payments, is that the trustee is the moving party at the Commission, and as the moving party, it is more in control, at least in the movement of how the case will progress; and as long as these payments are suspended, they will be in no hurry.